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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 In re: CATHODE RAY TUBE (CRT)
19 ANTITRUST LITIGATION

Case No. Master File No. 3:07-cv-05944-SC
MDL NO. 1917

20 This Document Relates to:

21 *Dell Inc., et al. v. Hitachi Ltd. et al.*, No. 13-
cv-02171

22 *Sears, Roebuck and Co. and Kmart Corp. v.*
23 *Technicolor SA*, No. 3:13-cv-05262

24 *Sears, Roebuck and Co. and Kmart Corp. v.*
25 *Chunghwa Picture Tubes, Ltd.*, No. 11-cv-
05514-SC

26 *Siegel v. Hitachi, Ltd.*, No. 11-cv-05502

27 *Siegel v. Technicolor SA*, No. 13-cv-05261
28

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO PARTIALLY
EXCLUDE THE EXPERT REPORT AND
OPINIONS OF JANUSZ A. ORDOVER –**

REDACTED

[Declaration of Laura K. Lin filed herewith]

Judge: Hon. Samuel Conti
Date: February 27, 2015
Time: 10:00 a.m.
Ctmm: 1, 17th Floor

1 *Target Corp. v. Chunghwa Picture Tubes,*
2 *Ltd.*, No. 11-cv-05514
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4 *ViewSonic Corporation v. Chunghwa Picture*
5 *Tubes Ltd.*, No. 14-cv-2510
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7 *Electrograph Systems, Inc., et al. v. Hitachi,*
8 *Ltd., et al.*, No. 3:11-cv-01656-SC
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10 *Electrograph Systems, Inc., et al. v.*
11 *Technicolor SA, et al.*, No. 3:13-cv-05724-SC
12
13 *CompuCom Sys., Inc. v. Hitachi, Ltd., et al.,*
14 *No. 3:11-cv-06396-SC*
15
16 *Interbond Corp. of Am. v. Hitachi, Ltd. et al.,*
17 *No. 3:11-cv-06276-SC*
18
19 *Interbond Corp. of America v. Technicolor SA,*
20 *et al.*, No. 3:13-cv-05727-SC
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22 *Office Depot, Inc. v. Hitachi, Ltd. et al, No.*
23 *3:11-cv-06276-SC*
24
25 *Office Depot, Inc. v. Technicolor SA, et al.,*
26 *No. 3:13-cv-05726-SC*
27
28 *P.C. Richard & Son Long Island Corp., et al.,*
v. Hitachi, Ltd., et al., No. 3:12-cv-02648-SC

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Schultze Agency Services, LLC on behalf of
Tweeter Opco, LLC and Tweeter Newco, LLC
v. Hitachi, Ltd., et al., No. 3:12-cv-2649-SC

Schultze Agency Services, LLC on behalf of
Tweeter Opco, LLC and Tweeter Newco, LLC
v. Technicolor SA., et al., No. 3:13-cv-05668-
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Tech Data Corporation; Tech Data Product
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al., No. 13-cv-00157

1 *Best Buy Co, Inc., et al v. Hitachi, Ltd.,*
Individual Case No. 11-cv-05513

2 *Best Buy Co., Inc., et al. v. Technicolor SA, et*
3 *al., No. 13-cv-05264-SC*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **QUESTION PRESENTED**

3 Whether the Court should decline to exclude portions of the expert report and opinions of
4 Dr. Ordoover where Dr. Ordoover is qualified as an expert by knowledge, skill, experience, training,
5 or education; his testimony is based on sufficient facts or data; his reasoning and methodology are
6 scientifically reliable; and his testimony will assist the trier of fact.

7 **SUMMARY OF ARGUMENT**

8 In their reports, Defendants' experts Dr. Carlton and Dr. Ordoover identify the flaws in
9 Plaintiffs' experts' damages reports and offer opinions that cast doubt on the conclusions in those
10 reports. Rather than offering an affirmative damages model, they critique Plaintiffs' experts'
11 models and—by offering partial corrections to those models—offer a ceiling on the possible
12 damages that Plaintiffs may recover. Defendants' experts were not asked to (and did not in fact)
13 construct affirmative calculations of overcharges for the purpose of providing a “reliable”
14 calculation of damages, which is not, of course, the Defendants' burden at trial.

15 Plaintiffs' efforts to exclude portions of Dr. Ordoover's report hinge on an implicit—and
16 legally unfounded—objection to this approach. Plaintiffs have asked the Court to exclude the
17 report and opinions of Dr. Ordoover to the extent they (1) incorporate the overcharge corrections
18 offered by Dr. Carlton in response to Plaintiffs' experts' calculations; or (2) relate to Plaintiffs'

19 [REDACTED]
20 [REDACTED] Both arguments depend on the flawed presumption that Defendants
21 bear the burden to provide a reliable damages estimate. Because Defendants bear no such
22 obligation, Plaintiffs' motion has no merit and should be rejected.

23 ***First***, Plaintiffs' objection to Dr. Ordoover's reliance on Dr. Carlton's overcharge
24 calculations is based solely on Dr. Carlton's purported “admission” at his deposition that his
25 overcharge calculations are not reliable. This testimony was not the stunning “admission”
26 Plaintiffs suggest it is. Dr. Carlton's supposed “admission” was nothing more than his expert
27 opinion that the corrections he believes must be made to Plaintiffs' flawed damages models still
28 did not render *Plaintiffs' models* sufficiently reliable to be capable of providing accurate or

1 “reliable” damages estimates. *See* Ex. 1 to the Declaration of Laura K. Lin in Support of
 2 Defendants’ Opposition to Dell’s Motion (“Lin Decl.”), Expert Report of Dennis Carlton (Dell)
 3 (“Carlton Report”) ¶ 121 at 72, Aug. 5, 2014. What Plaintiffs fail to acknowledge is that any
 4 unreliability is due to fundamental errors *in Dr. Rao’s approach to estimating overcharges*, not to
 5 any errors by Dr. Carlton. While Dr. Carlton improved upon Plaintiffs’ overcharge estimates with
 6 his modifications, he still could not cure all of their defects and was under no legal obligation to
 7 do so. *See, e.g., Allen v. Brown Clinic, P.L.L.P.*, 531 F.3d 568, 574-75 (8th Cir. 2008) (to require
 8 the defense expert to prove an alternative scenario “would unduly tie a defendant’s hand in
 9 rebutting a plaintiff’s case . . . [which] is much more than what should be required of a
 10 defendant”) (citation omitted); *Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 829 F. Supp. 2d
 11 802, 834-35 (D. Minn. 2011) (“the proper role of rebuttal experts [is] to critique plaintiffs’
 12 expert’s methodologies and point out potential flaws in the plaintiff’s experts’ reports”). The
 13 unreliability of Plaintiffs’ underlying model, however, does not render Dr. Carlton’s corrections,
 14 nor Dr. Ordoover’s use of those corrections, unreliable.

15 **Second**, Dr. Ordoover did not “vouch” for Dr. Carlton’s improvements to Plaintiffs’
 16 overcharge calculations as an accurate estimate of the alleged overcharge. Instead, Dr. Ordoover
 17 used Dr. Carlton’s calculations as an improvement to Dr. Rao’s overcharges to study the extent to
 18 which any claimed overcharges would have been passed on to various DAPs such as Dell. He was
 19 able to provide his analysis of this issue, and illustrate the maximum extent to which any pass-
 20 through would occur, without requiring that the overcharge improvements made by Dr. Carlton be
 21 reliable overcharge estimates, as neither of Defendants’ experts were using these improvements
 22 for the purpose of offering an affirmative damages analysis.

23 **Finally**, Plaintiffs’ objections to Dr. Ordoover’s opinions related to the FTAIA misconstrue
 24 the content of Dr. Ordoover’s conclusions and again impermissibly seek to shift the burden of proof
 25 to Defendants. Contrary to Plaintiffs’ claim, [REDACTED]
 26 [REDACTED] Dr. Ordoover applies industry-wide data to reach a specific conclusion as to
 27 *industry-wide purchases* that may be subject to exclusion pursuant to the FTAIA. He further
 28 opines that in light of this industry-wide finding, [REDACTED]

1 [REDACTED]. As with Dr.
 2 Ordoover's critiques to Plaintiffs' damages model overall, his critiques related to Dr. Rao's FTAIA
 3 analysis need not quantify Dr. Rao's exact errors in order to be admissible. *See, e.g., Allen*, 531
 4 F.3d at 574-75.

5 In sum, Dr. Ordoover's opinions reliably identify flaws in Plaintiffs' models and, as a result,
 6 are helpful to the jury's assessment of whether Plaintiffs have satisfied their burden of proof.

7 BACKGROUND

8 Defendants retained Dr. Carlton and Dr. Ordoover to analyze Plaintiffs' experts' opinions
 9 regarding damages. Defendants divided this task by asking Dr. Carlton (whose report has not
 10 been challenged via a *Daubert* motion) to analyze Plaintiffs' overcharge calculations and by
 11 asking Dr. Ordoover to analyze Plaintiffs' pass-through estimates and damages calculations. Dr.
 12 Carlton and Dr. Ordoover's ensuing opinions identified significant flaws in Plaintiffs' experts'
 13 approaches and offered certain corrections to Plaintiffs' models. In so doing, Defendants' experts
 14 have not attempted to construct an alternative "reliable" calculation of damages. Instead, their
 15 opinions challenge the reliability of Plaintiffs' own models and show how those models result in
 16 an overstated and unreliable damages calculation.

17 The present motion concerns two aspects of Dr. Ordoover's report.¹ *First*, Plaintiffs object
 18 that Dr. Ordoover relied on Dr. Carlton's corrections to Plaintiffs' overcharge calculations instead
 19 of conducting an independent critical assessment of the overcharge rate. *See, e.g., Mot.* at 5
 20 (criticizing Dr. Ordoover for "uncritically appl[ying]" Dr. Carlton's corrections); *but see also id.* at
 21 9 (criticizing Dr. Ordoover for explaining that he found Dr. Carlton's corrections persuasive).
 22 *Second*, Plaintiffs object that Dr. Ordoover offers an opinion on the effects of the FTAIA on
 23 Plaintiffs' damages claims when it was not possible for Dr. Ordoover to quantify precisely these
 24 effects given the data available to him. *See id.*; *see also* Ordoover (Dell) Report ¶ 52 at 30
 25 (attached as Exhibit B to the Declaration of Matthew Kent and referred to hereinafter as "Ordoover

26 _____
 27 ¹ Plaintiffs have not identified exactly which sentences or sections of Dr. Ordoover's report and
 28 opinions they seek to excise. Defendants reserve the right to put forth additional arguments or
 evidence should Plaintiffs later clarify their position.

Report”). Dr. Ordoover analyzed the industry-wide implications of the FTAIA and opined that given the substantial implications he observed, [REDACTED]
[REDACTED]
[REDACTED] *See, e.g.*, Ordoover Report ¶ 53 at 31. Dr. Ordoover critiques Plaintiffs experts’ damages calculations for [REDACTED] *Id.*

Notably, the division of labor between Defendants’ experts mirrors the approach taken by a substantial majority of the DAPs. For example, DAP expert Dr. McClave was charged with [REDACTED]
[REDACTED]
[REDACTED] *See* Lin Decl. Ex. 2, Expert Report of Dr. James McClave (“McClave Report”) at 4, 12, Apr. 15, 2014. Next, Dr. Frankel, another DAP expert, was tasked with [REDACTED]
[REDACTED]
[REDACTED] *See, e.g.*, Lin Decl. Ex. 3, Expert Report of Alan Frankel (Best Buy) (“Frankel Report”) ¶ 3 at 1, Apr. 15, 2014. As part of his damages calculation, Dr. Frankel also estimated the rate at which any alleged conspiratorial overcharges were passed-through to the DAPs. *Id.* Only Dell and Sharp retained single experts to undertake both of these assessments in a single report.

LEGAL STANDARD

Federal Rule of Evidence 702 permits qualified experts to give an opinion based on “scientific, technical, or other specialized knowledge,” if that knowledge will “help the trier of fact to understand the evidence or determine a fact in issue.” Fed. R. Evid. 702. Expert testimony must therefore meet two basic requirements to be admissible: (1) the testimony must be based on the special expertise of the expert; and (2) it must be helpful to the trier of fact, *i.e.*, must “logically advance[] a material aspect of the proposing party’s case.” *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (“*Daubert II*”). The party offering the proposed expert testimony must prove that the testimony satisfies the requirements for admissibility by a

preponderance of the evidence. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 n.10 (1993).

ARGUMENT

I. The DAPs Do Not, and Cannot, Contest Dr. Ordover's Qualifications

Dr. Ordover is a Professor of Economics and former Director of the Masters in Economics Program at New York University, where he has taught since 1973. *See* Ordover Report at 1. He has previously served as Deputy Assistant Attorney General for Economics at the Antitrust Division of the United States Department of Justice. *Id.* The DAPs implicitly concede that Dr. Ordover is qualified as an expert by knowledge, skill, experience, training, or education pursuant to Federal Rule of Evidence 703.²

II. The DAPs' Argument Concerning The "Unreliability" of the Defense Experts' Analyses Is Both Misleading And Inaccurate

Plaintiffs attack the reliability of Dr. Ordover's opinion by criticizing his use of Dr. Carlton's purportedly "unreliable" calculations. This theory twists Dr. Carlton's conclusion that Plaintiffs' *own expert's model* is unreliable into an argument that Dr. Carlton's calculations to correct certain flaws in Plaintiffs' expert's model are themselves unreliable. This logical leap finds no support in the record and cannot sustain Plaintiffs' effort to discredit Dr. Ordover's opinions incorporating Dr. Carlton's work.

A. Defendants' Experts Did Not Offer Affirmative Calculations As "Reliable" Estimates of Overcharges or Damages—and Were Under No Obligation to Do So

Plaintiffs repeatedly mischaracterize Dr. Ordover's report as presenting an "alternative damages opinion" based on Dr. Carlton's "alternative" overcharge analysis. *See* Mot. at 5-6, 8. In reality, as Plaintiffs know from the unequivocal testimony of Dr. Carlton and Dr. Ordover, these experts did not, in fact, construct their own alternatives for calculating overcharges or damages.

² Plaintiffs likewise point to nothing unsound or unreliable about the methodologies employed in Dr. Ordover's pass-through analyses. *See* Mot. at 5 ("Dell is not seeking to exclude Dr. Ordover's pass-through or opinions on revised damages totals arising from his pass-through analysis. Dell will challenge those opinions on cross examination at trial.").

1 For example, Dr. Carlton testified as follows in explaining that he did not conduct an affirmative
2 overcharge estimate:

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 See Lin Decl. Ex. 4, Deposition of Dennis Carlton ("Carlton Dep.") 312:20-313:3, Sept. 17, 2014.

7 Rather than preparing his own alternative model, Dr. Carlton's assignment was to
8 [REDACTED] see Carlton Report ¶ 4
9 at 5, as well as that of Dr. McClave. Based on this evaluation, Dr. Carlton concluded [REDACTED]

10 [REDACTED]
11 [REDACTED] See Carlton Dep. 313:19-23.

12 In the course of illustrating some of the many problems with Dell's overcharge estimates,
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24
25
26 ³ [REDACTED]
27 [REDACTED]
28 [REDACTED] See Carlton Report at 67-69.

1 Although Plaintiffs try to ignore this critical fact, Dr. Carlton testified that even his
 2 “corrected” overcharge calculations remain unreliable because they are based on the inherently
 3 flawed model *that is advocated by Dr. Rao (or Plaintiffs’ other experts):*

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]

7 [REDACTED]

8 [REDACTED]
 9 [REDACTED]

10 [REDACTED]

11 [REDACTED]
 12 [REDACTED]

13 [REDACTED]
 14 [REDACTED]

15 [REDACTED]

16 [REDACTED]
 17 [REDACTED]

18 Carlton Dep. 387:7-388:14.⁴

19 **B. Defendants’ Position That *Plaintiffs’* Experts Offer Unreliable**
 20 **Overcharge Estimates Does Not Render Defendants’ Critiques of Those**
 21 **Estimates Unreliable**

22 Plaintiffs’ complaint seems to be that Dr. Carlton did not completely disregard Dr. Rao’s
 23 flawed approach in favor of constructing his own model that would reliably estimate the alleged
 24 overcharge. As Plaintiffs know, however, it is their burden to prove injury and damages, and
 25 Defendants’ experts need not put forth an affirmative model in order to offer admissible
 26 testimony. *See, e.g., Primiano v. Cook*, 598 F.3d 558, 567 (9th Cir. 2010) (“The ‘will assist’

27 ⁴ Importantly, Dr. Carlton’s testimony regarding the reliability of his overcharge calculations was
 28 made in response to questions about his opinions and analyses in the Dell case only. To the extent
 the Court finds Plaintiffs’ motion persuasive, any such exclusion of Dr. Ordovery’s testimony
 should accordingly be limited to the Dell action.

1 requirement, under *Daubert*, goes primarily to relevance . . . [and] [w]hat is relevant depends on
 2 what must be proved.”) (citation omitted). Because Defendants do not bear the burden of proof,
 3 Defendants’ experts may reliably critique Plaintiffs’ models without attempting to replace them.
 4 *See 1st Source Bank v. First Res. Fed. Credit Union*, 167 F.R.D. 61, 65-66 (N.D. Ind. 1996)
 5 (“[R]ebuttal expert witness [] may criticize [plaintiff’s] damages theories and calculations without
 6 offering alternatives.”); *see also Aviva Sports*, 829 F. Supp. 2d at 834-35 (finding that defendants’
 7 “rebuttal experts sufficiently applied their expertise to the facts and methodologies used by each of
 8 [plaintiff’s] experts in forming their conclusions”).

9 Dr. Ordovery, like Dr. Carlton, also does not present any affirmative calculation of what
 10 damages Plaintiffs allegedly incurred. Instead, Dr. Ordovery opines that [REDACTED]

11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

24
 25
 26 ⁵ In fact, Dr. Ordovery calculates many estimates of what damages would have been under
 27 Plaintiffs’ experts’ methodologies if certain modifications were made to their overcharge, pass-
 28 through, and volume of commerce estimates. *See, e.g.*, Ordovery Report at Fig. 12; Lin Decl. Ex.
 10, Ordovery (Best Buy) Report at App’x 5; Lin Decl. Ex. 11, Ordovery Reply Report at App’x 4.1-
 4.16, Nov. 6, 2014.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]

5 Dr. Ordover's damages calculations, which incorporate his improved pass-through
 6 analyses and Dr. Carlton's adjusted overcharge calculations, are thus designed to critique and
 7 demonstrate some of the flaws and over-estimates contained in the unreliable damages model of
 8 Dr. Rao. Dr. Ordover's critiques, moreover, are based on the application of sound economic
 9 principles—a matter Plaintiffs do not dispute. As a result, there is no basis to exclude Dr.
 10 Ordover's expert testimony in critique of Plaintiffs' experts from this case. *See* Fed. R. Evid. 702;
 11 *see also Daubert*, 509 U.S. at 595.

12 **III. Dr. Ordover Permissibly Incorporated, but Does Not “Vouch” for, Dr.**
 13 **Carlton's Calculations**

14 Plaintiffs also wrongly assert that Dr. Ordover “vouch[es]” for Dr. Carlton's overcharge
 15 analysis without independent investigation and improperly adopts Dr. Carlton's work. Mot. at 7-
 16 8. In fact, Dr. Ordover's analyses and opinions in critique of Plaintiffs' experts in no way depend
 17 on whether Dr. Carlton's calculations provide reliable estimates of the overcharges incurred by
 18 Plaintiffs (which Dr. Carlton does not claim to be the case). Rather, as explained above, Dr.
 19 Ordover is well aware that Dr. Carlton's calculations are just illustrative improvements to the
 20 flawed overcharge estimates of Dr. Rao and do not purport to be sufficient to render Dr. Rao's
 21 methodology reliable.

22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

26 ⁶ *See also* Ordover Dep. 149:23-149 [REDACTED]

27 *id.* at 160:1-6 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 Dr. Ordoover need not reach such conclusions because he does not offer an affirmative opinion
4 quantifying the damages any of the Plaintiffs' allegedly incurred.

5 Nor was Dr. Ordoover required to conduct any analysis to assess the reliability of Dr.
6 Carlton's overcharge estimate corrections as neither he nor Dr. Carlton are offering them for the
7 purpose of creating an affirmative model. There is simply nothing improper about an expert report
8 that considers and incorporates the analyses of another expert for purposes of offering an opinion
9 about another subject in the case. *See, e.g., Buck v. Ford Motor Co.*, 810 F. Supp. 2d 815, 844
10 (N.D. Ohio 2011) ("[T]he process of analyzing assembled data while using experience to interpret
11 the data is not illicit; an expert need not actively conduct his or her own tests to have a valid
12 methodology. Rather, an expert's testimony may be formulated by the use of the facts, data and
13 conclusions of other experts.") (citations and quotations omitted). Indeed, "[w]hile experts may
14 not simply 'parrot' ideas of other experts, they are permitted to rely on materials used by other
15 experts in developing their own opinions." *Leese v. Lockheed Martin Corp.*, 6 F. Supp. 3d 546,
16 553 (D.N.J. 2014) ("Experts may use a mix of objective data and subjective analysis from another
17 expert to create an admissible report.") (citations and quotations omitted).

18 Plaintiffs' cases are inapposite as they address very different scenarios in which multiple
19 experts opined on the same issue and reached the same ultimate conclusion, with no additional
20 analyses or findings. *See In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 550 (S.D.N.Y.
21 2004) (excluding additional expert testimony that merely recited facts or repeated opinions of
22 another expert); *Tunis Bros. Co. v. Ford Motor Co.*, 124 F.R.D. 95, 98 (E.D. Pa. 1989) (excluding
23 additional expert testimony offered after trial had begun as "cumulative" where "the same
24 calculations and theory of damages will be presented to the jury through [plaintiff's first expert]").

25 Plaintiffs' other authority, *Estate of Cape v. United States*, No. 11-cv-0357, 2013 WL
26 4522933, at *2 (E.D. Wis. Aug. 27, 2013), is similarly unhelpful. There, plaintiff's expert relied
27 upon an expert report filed in a separate but related litigation as the primary basis for his opinion
28 on precisely the same issue, the overstatement of certain income. *Id.* at *3-4. The court held that

1 because plaintiff's expert had not personally observed the underlying facts and data, and the prior
2 report was not the type of evidence that "experts in [that] particular field would reasonably rely
3 on" under Federal Rule of Evidence 703, the report should be excluded. It is commonplace, by
4 contrast, for damages experts examining the issue of pass through to conduct such analyses using
5 the overcharge calculations by a second expert in the litigation without determining whether such
6 overcharge estimates are themselves reliable measures. *See, e.g., In re Static Random Access*
7 *Memory (SRAM) Antitrust Litig.*, No. 07-md-01819 CW, 2010 WL 5094289, at *2 (N.D. Cal. Dec.
8 8, 2010) ("Dr. Dwyer determined overcharges and pass-through rates Dr. Harris, IP
9 Plaintiffs' other expert, determined IP Plaintiffs' alleged damages based on Dr. Dwyer's
10 overcharge and pass-through analysis."); *In re Chocolate Confectionary Antitrust Litig.*, 289
11 F.R.D. 200, 209-10 (M.D. Pa. 2012).

12 The majority of DAPs' own experts in this case [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 It follows, a fortiori, that if it was proper for Dr. Frankel to offer affirmative damages
 2 testimony based on Dr. McClave's overcharge calculations without independently reviewing the
 3 reliability of such overcharge estimates, it was proper for Dr. Ordoover, who did not offer an
 4 affirmative damage study, to incorporate in his critique of plaintiffs' damages study what he found
 5 to be the "reasonable changes" to Dr. Rao's model made by Dr. Carlton.

6 **IV. The DAPs' Objections to Dr. Ordoover's FTAIA-Related Opinions Are**
 7 **Unfounded**

8 **A. Dr. Ordoover's Analysis of Industry-Wide Data to Reach Industry-Wide**
 9 **Conclusions Is Reliable**

10 In its effort to cast doubt on Dr. Ordoover's FTAIA-related opinions, Dell argues that an
 11 expert cannot reliably apply industry-wide data to reach a specific conclusion concerning which of
 12 Dell's purchases may be subject to exclusion pursuant to the FTAIA. This argument is a valiant
 13 attack on a straw man. Dr. Ordoover neither opines on a Dell-specific FTAIA calculation nor
 14 assumes that industry-wide data is representative of Dell's purchasing.⁷ Instead, Dr. Ordoover
 15 applies industry-wide data to reach a specific conclusion as to *industry-wide purchases* that may
 16 be subject to exclusion pursuant to the FTAIA.

17 In light of the opinion actually offered by Dr. Ordoover, Dell's reliability objections are
 18 unpersuasive. Dr. Ordoover examined [REDACTED]

19 [REDACTED]
 20 [REDACTED] See Ordoover Report ¶¶ 49-53 at 29-31. He applied these
 21 figures to estimate that [REDACTED]

22 [REDACTED] These are not "ipse dixit" figures concocted by Dr. Ordoover,
 23 but reasoned calculations premised on relevant and available data. Dr. Ordoover's estimations
 24 about the CRT monitor industry thus bear nothing in common with the "purely hypothetical
 25 _____

26 ⁷ See Ordoover Dep. 221:4-8 ("I don't believe I have calculated that number specific to Dell");
 27 Ordoover Report ¶ 52 at 30 ("It is not possible to tell from the available data which CRT monitors
 28 purchased in the U.S. contained CDTs that were manufactured by alleged cartel members or which
 were imported (much less who the importer was).").

assumptions” at issue in the cases cited by Dell. *See McPhail v. First Command Fin. Planning, Inc.*, 247 FRD 598, 605 (S.D. Cal. 2007) (rejecting an expert’s “purely hypothetical assumptions” about the number of user accounts that were cancelled, dormant, or inactive); *MDG Int’l, Inc. v. Australian Gold, Inc.*, No. 1:07-cv-1096-SEB-TAB, 2009 WL 1916728, at *4 (S.D. Ind. June 29, 2009) (rejecting expert’s testimony concerning sales markup and growth projection percentages that found no support in the record); *Elcock v. Kmart Corp.*, 233 F.3d 734, 740-41 (3d Cir. 2000) (rejecting expert’s attempt to calculate damages based on the assumption that the plaintiff suffered from a total disability where the underlying record showed that she was, at most, partially disabled); *Quinones-Pacheco v. Am. Airlines, Inc.*, 979 F.2d 1 (1st Cir. 1992) (same). Unlike the expert calculations in all of these cases, Dr. Ordover’s industry-wide conclusions are reliable because they are premised on hard data—not hypotheticals or unfounded assumptions. *See, e.g., Simon v. Weissman*, 301 F. App’x 107, 116 (3d Cir. 2008) (rejecting a party’s effort to exclude an expert’s estimations and distinguishing the export report in *Elcock* as involving “blatantly incorrect factual assumptions”).

Indeed, Dell’s own expert, Dr. Rao, likewise [REDACTED] [REDACTED] *See, e.g., Rao Report* at 25-31. *Cf. Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (causation testimony was “ipse dixit” of expert where expert relied on scientific studies unrelated to the question at hand to reach his conclusion). Dr. Rao admitted [REDACTED] [REDACTED] *See Lin Decl. Ex. 7, Deposition of Mohan Rao, Ph.D. (“Rao Dep.”)* 88:5-89:6, June 10, 2014. The same is true of Dr. McClave, [REDACTED] [REDACTED] *See Lin Decl. Ex. 8, Deposition of James McClave (“McClave Dep.”)* 181:3-184:4, 210:3-213:10, Dec. 3, 2014. When confronted with the fact that his model, [REDACTED] [REDACTED] [REDACTED] *See Lin Decl. Ex. 9, Rebuttal Expert Report of James McClave Rebuttal Report ¶¶ 9.0, 10.0 at 24-26.* The choices made by each of these experts to use industry-wide analysis in examining particular

1 DAP's damages may be subject to critiques and cross-examination at trial. But they do not render
 2 the opinions inadmissible.

3 **B. Dr. Ordoover's Critique of Dr. Rao's [REDACTED]**
 4 **[REDACTED] Is Reliable**

5 In addition to his industry-wide calculations, Dr. Ordoover concludes [REDACTED]

6 [REDACTED]
 7 [REDACTED] See Ordoover Report ¶ 49
 8 at 29; Ordoover Dep. 221:10-13. Dr. Ordoover explains that [REDACTED]

9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED] See Ordoover Report ¶ 53 at 31.

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED] See Ordoover Report ¶¶ 43-53 at 29-31; Ordoover
 16 Dep. 222:3-14 (noting that [REDACTED])

17 [REDACTED]. In concluding that [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]

25 Dr. Ordoover's assumptions are reasonable inferences, not the type of illogical leaps for
 26 which an expert's conclusions may be excluded. *See, e.g., Alaska Rent-A-Car, Inc. v. Avis Budget*
 27 *Grp., Inc.*, 738 F.3d 960, 968-70 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 644 (2013) (district court
 28 properly admitted expert opinion extrapolating from market data to reach conclusions about the

1 facts of the case; challenges to this approach “all go to the weight of the testimony and its
 2 credibility, not its admissibility”). The Court should exclude expert evidence if it is “unreliable
 3 nonsense,” *id.* at 970, or “speculative or conjectural or if it is based on assumptions that are so
 4 unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges
 5 comparison.” *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (internal
 6 citations and quotations omitted). “Other contentions that the assumptions are unfounded go to
 7 the weight, not the admissibility, of the testimony.” *Zerega Ave. Realty Corp. v. Hornbeck*
 8 *Offshore Transp., LLC*, 571 F.3d 206, 213-14 (2d Cir. 2009) (citation omitted).

9 Each of the purportedly contrary cases cited by Dell is factually distinguishable. *Brooke*
 10 *Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) concerned a motion
 11 for judgment notwithstanding a jury verdict—not the admissibility of an expert’s opinion.
 12 Plaintiffs’ remaining citations concern a *plaintiff’s* failure to put forth a reliable estimate in
 13 support of its own damages claim. *See Digital Reg. of Tex., LLC v. Adobe Sys., Inc.*, No. C 12-
 14 1991 CW, 2014 WL 4090550, at *1 (N.D. Cal. Aug. 19, 2014) (plaintiff’s expert’s damages-
 15 related calculations unreliable because he failed to justify assumptions related to industry data);
 16 *Am. Booksellers Ass’n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-42 (N.D. Cal.
 17 2001) (same); *Mercedes-Benz USA, Inc. v. Coats Auto. Grp., Ltd.*, 362 F. App’x 332, 334 (3d Cir.
 18 2010) (counterclaimant’s damages figures based on unsubstantiated assumptions); *see also Atl.*
 19 *Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1164 (10th Cir. 2000) (faulting
 20 counterclaimant’s expert for his *failure* to analyze industry data). These citations, like the bulk of
 21 Dell’s arguments, are inapposite here where Defendants have no obligation to put forth an
 22 alternative damages model to help Plaintiffs prove their case.

23 C. Dr. Ordover’s FTAIA-Related Opinions Are Helpful

24 Plaintiffs attempt to characterize Dr. Ordover’s FTAIA-related opinions as unhelpful on
 25 the ground that Dr. Ordover opines about the industry as a whole and did not calculate the exact
 26 extent to which Plaintiffs’ damages claims should be reduced to comply with the FTAIA. But
 27 Plaintiffs—not Defendants—bear the burden to satisfy the requirements of the FTAIA and to put
 28 forth a concrete, reliable damages figure. *See, e.g., Motorola Mobility LLC v. AU Optronics*

1 *Corp.*, --- F.3d ---, 2014 WL 6678622, at *2-3 (7th Cir. Nov. 26, 2014). Dr. Ordoover’s FTAIA
 2 opinion is helpful to the jury because it assists the jurors in holding Plaintiffs to their burden to
 3 provide a reliable damages estimate that complies with the requirements of the FTAIA. *See, e.g.*,
 4 *Allen*, 531 F.3d at 574-75 (to require the defense expert to prove an alternative scenario “would
 5 unduly tie a defendant’s hand in rebutting a plaintiff’s case . . . [which] is much more than what
 6 should be required of a defendant”) (citation omitted); *In re Flonase Antitrust Litig.*, 907 F. Supp.
 7 2d 637, 645-46 (E.D. Pa. 2012) (finding expert testimony on industry practices helpful and
 8 admissible even when not specific to the FDA petition at issue).

9 **D. Dell’s Critique of Dr. Ordoover’s FTAIA-Related Opinions Is**
 10 **Inapplicable to Other DAPs**

11 Even if Plaintiffs’ objections to Dr. Ordoover’s FTAIA-related opinions were persuasive
 12 with respect to Dell—which they are not—these objections carry no weight when parroted by the
 13 remaining DAPs. Dell contends that its own purportedly unique purchasing practices render Dr.
 14 Ordoover’s analysis of industry data inapplicable as to Dell. But neither Dell nor any of the other
 15 DAPs offer any argument that the other DAPs had any unique purchasing practices such that Dr.
 16 Ordoover’s analysis of industry-wide data is somehow unreliable or unhelpful with respect to their
 17 claims. Nor do these DAPs offer any other argument to suggest that Dr. Ordoover’s analysis of
 18 industry data is inapplicable as to them. For this reason, as well as the additional reasons set forth
 19 above, the other DAPs’ attempt to exclude Dr. Ordoover’s FTAIA-related opinion should be
 20 rejected.

21 **V. Plaintiffs’ Objections Are Properly Addressed at Cross-Examination**

22 Cross-examination, not exclusion, is the proper means to address Plaintiffs’ purported
 23 objections to Dr. Ordoover. *See Dorn v. Burlington N. Sante Fe R.R. Co.*, 397 F.3d 1183, 1196 (9th
 24 Cir. 2005) (noting the “liberal standard of admissibility set forth in” *Daubert*); *see also Loudermill*
 25 *v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988) (“As a general rule, the factual basis of an
 26 expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the
 27 opposing party to examine the factual basis for the opinion in cross-examination.”).

Any concerns Plaintiffs may have with respect to whether Dr. Ordover should have selected different data or conducted a different analysis should be presented to the jury via cross examination. “[O]ur adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony.” *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). *See also, e.g., United States v. Chischilly*, 30 F.3d 1144, 1154 (9th Cir. 1994), *overruled on other grounds by United States v. Preston*, 741 F.3d 1008 (9th Cir. 2014) (“[L]ower courts are not to confuse the role of judge and jury by forgetting that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than exclusion, are the traditional and appropriate means of attacking shaky but admissible evidence.”) (internal citation marks omitted) (citing *Daubert*, 509 U.S. at 596); *Warford v. Indus. Power Sys., Inc.*, 553 F. Supp. 2d 28, 35 (D.N.H. 2008) (“When an expert relies on the opinion of another, such reliance goes to the weight, not to the admissibility of the expert’s opinion.”).

Likewise, any doubts about the helpfulness of Dr. Ordover’s opinions should be left for the jury. *See Robinson v. Mo. Pac. R.R. Co.*, 16 F.3d 1083, 1090 (10th Cir. 1994) (“Doubts about whether an expert’s testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions. The jury is intelligent enough . . . to ignore what is unhelpful in its deliberations.”) (internal citation omitted).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs’ Motion and admit the challenged sections of Dr. Ordover’s report and opinions.

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Respectfully submitted,

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